

STATE OF MICHIGAN
COURT OF APPEALS

DONALD RIFE,

Plaintiff-Appellee,

v

PIONEER STATE MUTUAL INSURANCE
COMPANY,

Defendant-Appellant.

UNPUBLISHED

April 17, 2007

No. 267283

Tuscola Circuit Court

LC No. 04-000241-GC

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from the district court's judgment in favor of plaintiff, entered in response to the circuit court's reversal of the district court's earlier opinion on reconsideration favoring defendant, following a bench trial. We reverse and remand to the district court for reinstatement of its judgment on reconsideration. We decide this appeal without oral argument under MCR 7.214(E).

I. FACTS

Violent weather caused a tree to fall on plaintiff's home and shed, damaging the roof of the home along with the shed and its contents. Plaintiff filed a claim with defendant, his homeowner's insurer. The policy required defendant to compensate covered personal property losses "at actual cash value at the time of loss but not more than the amount required to repair or replace," and covered buildings at replacement cost, with no deduction for depreciation, subject to a provision stating that defendant "will pay no more than the actual cash value of the damage unless . . . actual repair or replacement is complete" The replacement cost endorsement in turn provided that "[w]hen the replacement cost for the entire loss under this endorsement is more than \$500, we will pay no more than the actual cash value for the loss or damage until the actual repair or replacement is complete," and that the insured "may make a claim for loss on an actual cash value basis and then make claim within 180 days after the loss for any additional liability in accordance with this endorsement."

At trial in the district court, the parties stipulated to dollar values representing the repair cost to the roof of the home, an upgrade of the roof to satisfy the applicable building code, and replacement costs for the storage building, a tiller, an air conditioner, a wheelbarrow, and what plaintiff paid to have the tree stump removed. Plaintiff testified on cross-examination that he had

not yet replaced or repaired any of the items in question, except for the completed stump removal. The district court awarded plaintiff amounts intended to cover the roof minus the upgrade, along with the other items over which the parties had stipulated.

Defendant moved for reconsideration. The district court granted the motion, accepting the argument that the parties had stipulated to repair or replacement costs, but not to actual cash values of the items in question at the time of damage, and that the testimony at trial demonstrated that plaintiff had not completed any repairs or replacements beyond removal of the tree stump. Accordingly, the district court concluded it had “made a mistake of fact in interpretation of the policy,” and that plaintiff had not met his burden of proof of establishing actual cash value of any of the damaged property. The court thus limited plaintiff’s award to \$500, plus costs and fees, covering the tree stump removal, which was the only replacement or repair cost in evidence.

Plaintiff appealed to the circuit court, which reversed on the ground that the parties had stipulated to the repair or replacement costs for the home and the personal property, and “therefore Defendant must pay these amounts to Plaintiff.” Defendant argues that the circuit court erred in so doing because plaintiff failed to prove the actual cash value of his loss and was not entitled to replacement cost benefits. We agree.

II. STANDARD OF REVIEW

The construction and interpretation of an insurance contract is a question of law that is reviewed de novo. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

III. ANALYSIS

The policy language unambiguously imposes no obligation on defendant to pay full repair or replacement cost unless plaintiff actually completed the pertinent repairs or replacements. Defendant was otherwise required to pay only actual cash value. Our Supreme Court was confronted with similar contract language in *Smith v Michigan Basic Property Ins Ass’n*, 441 Mich 181, 185 n 3; 490 NW2d 864 (1992), and held that the insured must “actually repair, rebuild, or replace at the same or another site before the insurer becomes liable to pay the difference between actual cash value and replacement cost.” *Id.* at 183.

In this case, plaintiff’s admission that he had not yet replaced or repaired any of the damaged property, except for stump removal, left defendant liable for only the actual cash value of the damaged property. Plaintiff’s counsel stipulated to repair or replacement costs, but actual cash value was never established. The circuit court recognized that the actual-cash-value provision applied, but then went on inexplicably to cite the stipulations concerning repair or replacement costs as the basis of defendant’s obligations. Plaintiff likewise emphasizes that the parties stipulated to repair and replacement costs, and inveighs that “a stipulation is a stipulation.” But plaintiff fails to acknowledge that what is mainly at issue is actual cash value, over which there was no stipulation.

Plaintiff in fact rested on the stipulations, without putting actual cash values in evidence. “[T]he insured bears the burden of proving coverage.” *Michigan Twp Participating Plan v Federated Ins Co*, 233 Mich App 422, 432; 592 NW2d 760 (1999), quoting *Heniser v*

Frankenmuth Mut Ins Co, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995). For these reasons, the district court correctly ruled on reconsideration that plaintiff had failed to prove actual cash value, and that plaintiff was thus entitled to only the \$500, plus costs and fees, stemming from the removal of the tree stump. Accordingly, we reverse the circuit court, and remand this case to the district court for reinstatement of its judgment on reconsideration.

Reversed and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Bill Schuette